1988

Claude L. Heiner and Dan H. Hunter v. S.J. Groves and Sons Co., a Minnesota corporation; and Western States Mineral Corp., a Utah corporation : Brief of Appellant

Utah Court of Appeals

Reed L. Martineau, Stephen J. Hill; Snow, Christensen & Martineau; attorneys for apellants.
David K. Isom, Scott F. Young; Davis, Graham & Stubbs; attorneys for respondents.

IN THE UTAH COURT OF APPEALS

- -

CLAUDE L. HEINER and DAN H. HUNTER,

Plaintiffs-Appellants,

vs.

No. 880204-CA
Category 15

S.J. GROVES & SONS CO., a Minnesota corporation; and WESTERN STATES MINERAL CORP., a Utah corporation,

Defendants-Respondents.

- -

BRIEF OF APPELLANTS

- -

Appeal from the Judgment of the
Seventh Judicial District Court, Emery County
Honorable Boyd Bunnell, District Judge

- -

DAVID K. ISOM
SCOTT E. ISAACSON
DAVIS, GRAHAM & STUBBS
1600-87 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Respondent

REED L. MARTINEAU
STEPHEN J. HILL
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145

Attorneys for Appellants

IN THE UTAH COURT OF APPEALS

- -

CLAUDE L. HEINER and DAN H. HUNTER,

Plaintiffs-Appellants,

vs.

No. 880204-CA
Category 15

S.J. GROVES & SONS CO., a Minnesota corporation; and WESTERN STATES MINERAL CORP., a Utah corporation,

Defendants-Respondents.

- -

BRIEF OF APPELLANTS

- -

Appeal from the Judgment of the
Seventh Judicial District Court, Emery County
Honorable Boyd Bunnell, District Judge

- -

DAVID K. ISOM
SCOTT E. ISAACSON
DAVIS, GRAHAM & STUBBS
1600-87 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Respondent

REED L. MARTINEAU
STEPHEN J. HILL
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145

Attorneys for Appellants

LIST OF PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24(a)(1) Rules of the Utah Court of Appeals, the appellants offer the following listing of all parties that they are aware of to this proceeding:

Claude L. Heiner
Dan H. Hunter
S.J. Groves & Sons Co.
Wester States Mineral Corp.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

- -

CLAUDE L. HEINER and DAN H. HUNTER,

Plaintiffs-Appellants,

vs.

No. 880204-CA
Category 15

S.J. GROVES & SONS CO., a Minnesota corporation; and WESTERN STATES MINERAL CORP., a Utah corporation,

Defendants-Respondents.

- -

BRIEF OF APPELLANTS

- -

JURISDICTIONAL STATEMENT AND PROCEEDINGS BELOW

This Court has jurisdiction to hear this matter pursuant to the provision of Utah Code Annotated §78-2A-3(2)(j).

On December 23, 1987 the Honorable Boyd Bunnell granted Defendants' Motion to Dismiss on the basis that Plaintiffs' Complaint failed to state a claim upon which relief could be granted. The Memorandum Decision was entered as an order on January 6, 1988 and the Notice of Appeal in this case was filed on February 3, 1988.

STATEMENT OF ISSUES FOR REVIEW

Did the lower court err in granting Defendant's Motion to Dismiss Plaintiffs' Complaint for failure to state a claim upon

which relief can be granted based upon the assumption that a subpurchaser of mining claims can enter into a separate agreement with the original vendor and significantly modify the original sales agreement (to which it was not a party) even though such agreement significantly defines the obligations between the original purchaser and subpurchaser and such modification, if valid, extinguishes all rights of the original purchaser to receive royalty payments from the subpurchaser?

STATEMENT OF THE CASE

This is an action which was commenced by Plaintiffs against defendant S.J. Groves & Sons Co. and its successor in interest defendant Western States Mineral Corp. (hereinafter collectively referred to as "Defendant"), seeking damages for the alleged wrongful breach of a "Purchase Agreement" entered into between Plaintiffs and Defendant. After hearing argument, the lower court determined pursuant to the various agreements entered into between these parties and others that there was no claim stated by the plaintiffs upon which relief could be granted. Accordingly, the court granted Defendant's Motion to Dismiss.

The procedural facts in this case are undisputed. Essentially, the case involves a number of mining claims located in Emery County, Utah. In May of 1975 plaintiffs Claude L. Heiner and Dan H. Hunter entered into an agreement entitled "Option to Purchase and Purchase Agreement" (hereinafter the "1975 Agreement") with James R. Dickert and Robert Eddy. At this time the plaintiffs agreed to assume five coal leases for the coal mine known as Dog Valley Mine which are the subject of this action.

The 1975 Agreement is attached herein as Exhibit "A" to the Appendix. It is this document which is the underlying basis of Plaintiffs' present claim.

In the 1975 Agreement Plaintiffs paid $30,000 cash for the assignment of the leases and for certain equipment and agreed to pay to Dickert and Eddy an overriding royalty of 25 cents per ton of coal mined plus 1% of any money over $15 per ton received upon the sale of any coal.

The Agreement contained the following clause:

> Buyers hereby agree that from and after the transfer to them of said leases they will enter onto the subject lands and commence mining operations for coal with reasonable dispatch and to continue such mining operations with reasonable diligence until all of the reasonably mineable and merchantable coal on, in and under the subject land has been mined, removed and sold. Merchantable coal shall include only that coal that can be mined, removed and sold at a reasonable profit. In the event of the occurrence of an event or events beyond the reasonable control of the Buyers then Buyers shall be excused from performing the obligations imposed upon them under this paragraph during the continuation of such event and to the extent made reasonably necessary by such event. (1975 Agreement, paragraph 3).

The 1975 Agreement also provided language as to termination. It stated:

> In the event Buyers shall voluntarily decide to terminate their interest under any of said leases or in the event of the default of Buyers or their assignees under any of said leases which default shall remain uncorrected after thirty (30) days' actual notice of such default, Sellers shall be entitled to the reassignment of the leases and Buyers agree to use their best efforts to secure the approval or consent of the Utah State Land Board to such reassignment. (1975 Agreement, paragraph 5).

The parties also agreed that they could assign their rights under the Agreement and that any such assignees would have the

rights and obligations contained in the 1975 Agreement. (1975 Agreement, paragraph 8).

On March 1, 1976 the successors of the plaintiffs and defendant S.J. Groves & Sons Co. entered into a "Purchase Agreement". (Hereinafter referred to as the "1976 Agreement"). The Agreement provided that the plaintiffs would sell to the defendant the net assets subject only to assumed liabilities under the terms of the Agreement. (1976 Agreement, Paragraph 2.1). A copy of the 1976 Agreement is contained in the Appendix of this Brief as Exhibit "B". The purchase price for the net assets was two million dollars together with a clause relating to an overriding royalty on behalf of the plaintiffs. It stated:

> An overriding royalty to be reserved in the Assignment of the Leases (or reassigned by Buyer) to vest Western States Properties, [the successor of plaintiffs], its successors and assigns, with a royalty <u>on all coal produced and sold from the Lease Property by Buyer,</u> its successors and assigns, as follows: 20 cents per ton on the first 2.5 million tons and 30 cents per ton on all coal produced and sold thereafter. [1976 Agreement, paragraph 3.1(b)]. (Emphasis added).

In another portion of the contract the following language is contained relating to the 1975 Agreement:

> Buyer will from and after the Closing <u>perform and pay as and when due all obligations required under said</u> Option to Purchase and Purchase Agreement dated May 28, 1975. (1976 Agreement, paragraph 7.10). (Emphasis added).

Finally, Section 9 of the Agreement was entitled "Termination of Agreement" and contained various remedies for termination by either the buyer or the seller. Essentially, the Buyer (Defendant) was only allowed to terminate under the terms of this Agreement for the failure of the Sellers to satisfy the material

conditions precedent to the closing of the transaction. On the other hand, the Sellers were given the option of terminating for any default by the Buyer if it was not cured within thirty days. (1976 Agreement, paragraph 9.1).

Paragraphs 9.2, and 9.3 also apply to remedies in the event of termination. These provisions state:

> 9.2. If the contract is terminated pursuant to 9.1(i), Sellers shall be obligated to restore and return to Buyer all the payments made to Buyer under this Agreement. Buyer shall reassign to Sellers the Net Assets and all parties shall thereupon be released from any further obligation under the Agreement.
>
> 9.3. If Sellers elect to terminate pursuant to 9.1(ii), the (a) Sellers shall be released from all obligations under this Agreement; and (b) Sellers shall have the right to damages as provided in law for loss of their bargain by reason of the default of Buyer.

As of 1981, the majority of the original parties to these Agreements had changed by various assignments or successions. Virginia Dickert had succeeded to the overriding royalty interest of her deceased husband James Dickert. Robert Eddy, however, still owned his overriding royalty. Western States Minerals Corp. assumed the position of S.J. Groves & Sons Co. which was the original buyer in the 1976 Agreement. Plaintiffs Claude Heiner and Dan Hunter reassumed the interest of Western States Minerals Corp., which was the seller in the 1976 Agreement.

In 1981 Defendants ceased mining coal at the Dog Valley Mine. On October 1, 1981 a third agreement was entered into between Virginia Dickert and Robert Eddy as the "Sellers" and Western States Minerals Corp. as the "Buyer". (Hereinafter referred to as the "1981 Agreement"). This Agreement was entitled "Amendment to Option to Purchase and Purchase Agreement." A copy of this

Agreement is contained herein as Exhibit "C".

The parties to that Agreement agreed, among other things, that Western States (Defendant) would not be in default of the 1975 Agreement irrespective of whether Western States mined coal, so long as Western States paid minimum royalties of $3,000 per month to Dickert and Eddy. (Paragraph A). They also agreed that once the total sum of $1,250,000 had been paid as a minimum royalty that no subsequent monthly royalty payment would be required and that any money paid as a minimum monthly royalty would be treated as a production royalty payment under paragraph 4 of the original Agreement. (Paragraphs C and D of 1981 Agreement).

Finally, the Agreement provided that the Buyers' obligation to make minimum monthly royalty payments under Paragraph A of the Amendment or production royalty under Paragraph 4 of the original Agreement would terminate upon reassignment of the leases to the Sellers pursuant to Paragraph 5 of the Agreement. All other terms, conditions and covenants would remain in full force and effect.

It is assumed that between 1981-1985 minimum monthly payments were paid to Dickert and Eddy. No overriding royalty payments were paid to Plaintiffs. In 1985, Defendants reassigned the underlying mining leases back to Dickert and Eddy.

In 1987 this Complaint was initiated against Defendant on the basis that it had failed to continue its duty to mine under Paragraph 4 of the 1976 Agreement and that such failure resulted in damages to the plaintiffs of an amount not less than $1

million. A copy of the Complaint is attached herein as Exhibit "D".

On December 22, 1987 oral arguments were presented by the parties as to Defendants' Motion to Dismiss. Subsequently, on December 23, 1987 a Memorandum Decision was entered by the lower court. A copy of this Decision is contained herein as Exhibit "E". The lower court found that the 1976 Agreement obligated the Defendant to Dickert and Eddy as far as its mining operation but did not obligate it in any way to the plaintiffs. Thus, under the Court's reasoning since the defendant entered into a separate agreement with Dickert and Eddy thereby satisfying them as to any mining requirement the plaintiffs had no remedy available to them in that there was no independent duty as to the plaintiffs for continuous mining.

Furthermore, the Court found that the 1976 Agreement was clear and unambiguous, that the overriding royalty to the plaintiffs would only occur as to any coal mined and that there was no agreement that a minimum or continuing mining obligation existed as between the plaintiffs and the defendant. The lower court therefore found that Plaintiffs failed to state a claim upon which relief could be granted. It is from this order that the present appeal is taken.

SUMMARY OF ARGUMENTS

1. The lower court erred in concluding that there was no independent obligation between the plaintiffs and the defendant in this case and that by satisfying Dickert and Eddy the defendant was therefore relieved as to any obligation to the

plaintiffs. The court misconstrued the various transactions as one of assignment rather than sale. The court failed to recognize that independent agreements were entered into in the 1976 Agreement between Plaintiffs and Defendant which were separate and apart from the obligations existing in the 1975 Agreement.

2. The lower court essentially found that a novation had occurred and that the original 1975 Agreement had been superceded by the 1981 Agreement. This finding was incorrect since the plaintiffs were not made parties to the 1981 Agreement and their rights therefore could not be extinguished.

3. The lower court failed to recognize that the defendant had an obligation to act in good faith towards Plaintiffs and to protect the overriding royalty interest of Plaintiffs and that entering into a separate agreement with Dickert and Eddy violated this duty.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN CONCLUDING THAT THERE WAS NO INDEPENDENT OBLIGATION RUNNING BETWEEN PLAINTIFFS AND DEFENDANT AND THAT DEFENDANT COULD THEREFORE EXTINGUISH ANY LIABILITY BY MAKING A SIDE AGREEMENT WITH DICKERT AND EDDY.

While the Agreements themselves and the facts leading up to them are essentially undisputed, the interpretation of these Agreements is greatly disputed. Under the interpretation of the defendant, the 1975 Agreement established all of the rights and liabilities relating to the coal leases. Defendant views the 1976 Agreement as merely an assignment of those rights and liabilities with the plaintiffs being mere conduits to convey the rights and

liabilities previously granted to them in the 1975 Agreement. Under this theory, therefore, in order to satisfy the mining obligation it was only necessary to go back to the original grantors, Dickert and Eddy, and to cut a deal with them in order to avoid any liability under the various agreements. Defendant asserts, therefore, that once the 1976 Agreement was entered into between Plaintiffs and Defendant that its only obligation was to pay to Plaintiffs an overriding royalty in the event that any coal was produced. By satisfying Dickert and Eddy under the 1981 Agreement no further obligation to mine coal existed and therefore Plaintiffs' overriding royalty was extinguished. This characterization of the Agreements was essentially adopted by the lower court.

On the other hand, Plaintiffs claim a different interpretation of these Agreements. Under the arguments advanced by Plaintiffs, the 1975 Agreement established both liabilities and rights. In 1976, a separate Agreement was entered into between Plaintiffs and defendant which was not an assignment of the 1975 Agreement and which contained its own rights and liabilities. It was the position of the plaintiffs that the 1976 Agreement was controlling except as to that particular portion of the 1976 Agreement which required the defendant to perform and pay when due all obligations required under the 1975 Agreement. (Paragraph 7.10 of the 1976 Agreement). As part of this "obligation" Defendant was required to mine the property as long as it was commercially profitable as defined in the 1975 Agreement.

Thus, Plaintiffs in their Complaint alleged that while

Defendant may have fully satisfied its obligations to Dickert and Eddy, this did not eliminate the independent obligation going to the plaintiffs to continue mining and to pay the overriding royalty. Hence, since the plaintiffs were not part of the 1981 Agreement, defendant was still liable to them for the damages caused in terminating the mining operation and in failing to pay the overriding royalties.

The lower court failed to make the necessary analysis of the language in these contracts and simply decided that the conduit theory of the defendant was correct and that plaintiffs were therefore entitled to nothing once Dickert and Eddy had agreed that no further mining was required. This interpretation is clearly erroneous.

Preliminarily, it should be noted that Plaintiffs did not assign the 1975 Agreement to defendant but rather sold defendant the subject coal leases. Paragraph 2.1 of the 1976 Purchase Agreement provides:

> Sellers agree to sell to Buyer and Buyer agrees to purchase from Sellers the Net Assets . . . .

Paragraph 1.4 of the 1976 Purchase Agreement defines the "net assets" to include the subject coal leases.

While the coal leases themselves were clearly assigned to the defendant, such assignment does not affect the characterization of the 1975 and 1976 Agreements. If the assignment of the coal leases themselves was all that was required, then the entire 1976 Agreement would have been redundant and unnecessary to establish the rights and obligations of the parties. In reality, where a lessee reserves an overriding royalty when making a purported

assignment of a mineral lease, the "assignment" is in legal effect a sublease. Robinson v. North American Royalties, Inc., 463 S.2d 1384 (La. App. 1985). The assignments were only a portion of the total documentation required under the 1976 Agreement and did not constitute an assignment of the 1975 Agreement.

The characterization of these two Agreements is critical to the determination of this case. If, as the defendant argued and the court concluded, the 1976 Agreement was merely an assignment of the interest and obligations of the 1975 Agreement then defendant could have extinguished any obligations to the plaintiffs by simply satisfying Dickert and Eddy. On the other hand, if the 1976 Agreement created separate obligations and liabilities to the plaintiffs, then the 1981 Agreement with Dickert and Eddy was of no consequence to those separate obligations unless the plaintiffs were parties to the modifications.

An analysis of these various documents shows that the position of the plaintiffs is correct and that their Complaint clearly stated a cause of action. It is obvious from even a cursory examination of the 1975 and 1976 Agreements that the two differed significantly in their terms, rights, and obligations. The only reference in the 1976 Agreement to the 1975 Agreement is contained in Paragraph 7.10 which basically states that defendant undertakes to perform and pay when due all obligations required under the 1975 Agreement. This language is specific and limits any interrelationship between the two Agreements to the defendant assuming the financial obligation of the prior contract. It does

not, however, give the defendant any further rights beyond those contained in the 1976 Agreement.

The 1976 Agreement represents what is commonly known as a subpurchase in which the owner of real property resells his interest to another rather than merely assigning a prior contract. As noted by one treatise:

> A subcontract by a purchaser to sell his interest under a contract of sale is not an assignment, but a separate and independent contract between the purchaser and his assignee and a subpurchaser. . . .
>
> * * *
>
> A subpurchase creates between the original vendor and subpurchaser a privity of estate, but does not, in the absence of agreement, create a privity of contract.
>
> * * *
>
> Unless the vendor assumes the obligation, a vendor not in privity of contract with a subpurchaser is not liable to the subpurchaser for the fulfillment of the contract between the purchaser and the subpurchaser. (92 C.J.S., Vendor and Purchaser, §314, p. 202-03).

See also, Greenbaum v. Smith, 409 A.2d 621 (D.C. App. 1979); Campbell v. Kerr, 618 P.2d 1237, 1243 (N.M. 1980).

An analysis of the 1976 Agreement shows that it was in effect a subpurchase with the plaintiffs being in the position of the original purchasers and the defendant being in the position of the subpurchaser. Thus, there was no privity of contract between Dickert and Eddy and the defendant except as to the extent that defendant assumed any obligations existing in the 1975 Agreement.

> Before a subpurchaser can be held to answer to the vendor there must be an explicit agreement on his part to do so, or conduct from which the law implies such a promise. A subpurchaser does not assume personal responsibility to the vendor because he knows

> of the contract between the vendor and purchaser and that it will be forfeited if he does not pay on the subcontract, or because the payment under the subcontract corresponds with those under the original contract, or because the subpurchaser has the right to make payments directly to the vendor or agrees that his payments should be paid to the vendor. 92 C.J.S., Vendor and Purchaser, §314, p. 205. (Emphasis added).

With this distinction in mind, an examination of the various agreements reveals the following: First, defendant agreed to pay to the plaintiffs an initial sum of compensation for the assignment of the leases and for the equipment. In the event that the closing had not occurred because of the failure of Plaintiffs to satisfy the various conditions of the 1976 Agreement defendant would have been entitled to terminate the Agreement and all the parties would have been returned to their original status.

Once the agreement was completed, however, defendant was limited as to its actions. Defendant, was required to pay to Dickert and Eddy the royalty percentage required in the 1975 Agreement. Under the terms of the 1975 Agreement it was required to continue mining such coal until all of the "reasonably mineable and merchantable coal on, in and under the subject lands had been mined, removed and sold." (1975 Agreement, paragraph 3). At the same time, under the 1976 Agreement defendant was obligated to pay Plaintiffs an overriding royalty on this same amount of coal mined. Thus, the 1975 Agreement provided the privity necessary to require defendant to pay Dickert and Eddy and also defined the conditions for mining which was to occur as to Plaintiffs' overriding royalty pursuant to the 1976 Agreement.

Second, it is fundamental that the documents which convey

mineral interests are subject to the same general rules that govern interpretation of any contractual agreements. Miller v. Schwartz, 354 N.W.2d 685 (N.D. 1984). As such, where a reference to another writing is made in a contract for a particular and specified purpose, such other writing becomes a part of the underlying contract only for that specified purpose. Lincoln Welding Works v. Ramirez, 647 P.2d 381 (Nev. 1982). See also, Weber v. Anspach, 473 P.2d 1011 (Or. 1970).

The parties in this case intended that certain of the conditions and covenants existing in the 1975 Agreement (original royalty payment and obligation to mine requirement) apply to the relationship of the parties in the 1976 Agreement but all other conditions and covenants were to be governed exclusively by the 1976 Agreement.

An example of this principle can be seen by examining the termination clauses of the 1975 and 1976 Agreements. The 1975 Agreement provided in Paragraph 5 a procedure for termination of the leases and reassignment to Dickert and Eddy. The 1976 Agreement, however, stated that if the defendant terminated unjustly then the plaintiffs would have the right to damages as provided in law for the loss of their bargain by reason of the default of the buyer. (1976 Agreement, Paragraph 9.3).

Thus, defendant cannot claim the benefit of the termination provision of the 1975 Agreement since a separate and distinct termination provision was provided in the 1976 Agreement as to it only. The fact that the plaintiffs in this case chose to make a more restrictive subpurchase agreement than the original

agreement is of no consequence as long as the original agreement is fully satisfied.

In real estate transactions such a concept is common. An original seller and buyer may sell a house for $40,000 at 8% interest with no prepayment penalty or late fees. Subsequently, that purchaser may resell the property to a third party for $90,000, at 10% interest, with prepayment penalties and with late fees. In such a case, the subpurchaser cannot claim the benefit of the first contract since he is not a party to it. While the subpurchaser may have agreed, for example, to make direct payments to the first purchaser this still does not entitle him to claim the other benefits of the original contract. The principle in this case is no different.

The type of action which is sought in this case is best illustrated by the case of Smith v. King, 722 P.2d 796 (Wash. 1986) (en banc). In that case the owners of an apartment house sold the property to the first purchasers under a real estate contract (Contract 1). The purchaser price was zero down, with monthly interest installments of $452 and a balloon payment of $57,000 due on September 30, 1981.

Subsequently, the first purchasers resold the property to the second purchasers by a second real estate contract (Contract 2). As part of the purchase price the second purchaser expressly assumed and agreed to pay all amounts still due to the owners on the first contract ($57,000 plus interest installments). In addition, the second purchasers agreed to pay the following to the first purchasers: $9,000 down, monthly interest installments of

$200 and a balloon payment of $24,000 due on June 20, 1986. Thus, the purchase price on Contract 2 totalled $90,000 plus interest.

After the second purchasers assumed the property they abandoned it and allowed it to be vandalized. Ultimately the original owners foreclosed on both the first and second purchasers and received the property back. The first purchasers filed a crossclaim against the second purchasers claiming damages because of the forefeiture. The court in sustaining a judgment in favor of the first purchasers stated the following:

> Unless the real estate contract between the first purchasers and the second purchasers (Contract 2) provides otherwise, the first purchasers may sue the second purchasers for actual damages resulting from the latter's breach of contract. The first purchasers are entitled to be placed in as good a pecuniary position as they would have been had the second purchasers not breached the contract. Thus, where the second purchasers' breach caused the first purchasers' interest in the subject property to be forfeited, the first purchasers are entitled to damages equal to the unpaid portion of the purchaser price payable to the first purchasers under the contract. Id. at 799. (Emphasis added).

Here, when the 1976 Agreement was consummated, defendant was obligated by the various terms of the 1976 Agreement to perform including the obligation to pay directly to Dickert and Eddy the amount of royalty required under the 1975 Agreement. The parties understood that this royalty was conditioned upon the ability to commercially mine the property. In addition, defendant was obligated to pay to Plaintiffs an overriding royalty on all ore mined.

Had defendant gone to Plaintiffs and shown them that it was unable to commercially mine the property then any further royalties would be excused under both agreements. Instead,

however, defendant bypassed Plaintiffs entirely and went directly to Dickert and Eddy for the purpose of eliminating any requirement to mine at all. This action assumed that there was no obligation to the plaintiffs to continue mining the property under a commercial standard and that the sole obligation rested with Dickert and Eddy. As noted earlier, however, the 1976 definitional requirement of mining became an integral part of the 1976 Agreement and was binding between Plaintiffs and defendant just as much as it was originally between Plaintiffs and Dickert and Eddy. It was therefore necessary for defendant to satisfy not only Dickert and Eddy as to any cease of mining operations but also to satisfy the plaintiffs. This it failed to do.

The lower court relied upon a Seventh Circuit Court of Appeals decision of Piamco Inc. v. Shell Oil Co., 799 F.2d 262 (7th Cir. 1986). The lower court in construing this case stated:

> The Court quite agrees with the reasoning set forth in the case of Piamco, Inc. v. Shell Oil Co. handed to the court by counsel for the plaintiff at oral argument and which case is a federal case from the Seventh Circuit. In that case the court found and stated that there can be no doubt that as a general matter overriding royalty obligations end with the termination of the estate from which the interests were carved, absent an express contractual provision to the contrary. The court went on to state that the agreement betwen these parties itself manifests a clear intention to bind Shell to make such royalty payments regardless of the fate of the undermining leases.
>
> In this case, we have no clear intention stated in the agreement that this would be the case. On the contrary, the agreement is very clear and unambiguous that the royalty that may be due to the plaintiffs will be paid on all coal mined and sold by the defendant or its assigns. There was no express agreement to pay any sort of a minimum or to continue mining indefinitely as contended by the plaintiffs. (Memorandum Decision, pp.

4-5). (Emphasis added).

The Court misconstrued the position of the plaintiffs. Plaintiffs did not contend that they were entitled to a mininum royalty if mining had been legitimately terminated. Neither did Plaintiffs contend that defendant was required to indefinitely mine the property in order for Plaintiffs to receive a royalty. Rather, Plaintiffs contended that defendant was obligated to mine the property as long as the property could be mined in a commercially feasible manner and that such obligation continued in spite of the 1981 Agreement attempting to modify the underlying definition. Plaintiffs have never contended that they are entitled to an overriding royalty if the underlying leases are legitimately terminated because of the conditions contained in the 1975 Agreement.

Defendant in this case has made no claim that it was unable to commercially mine these properties. Instead, it has relied entirely upon its 1981 Agreement with Dickert and Eddy as justification for eliminating any overriding royalty of the plaintiffs. Thus, under the various documents defendant was still liable to mine the property and Plaintiffs are entitled to be able to prove what damages, if any, they suffered because of the premature termination of such mining.

The lower court therefore erred in granting defendant's Motion to Dismiss.

POINT II

THE 1981 AGREEMENT ENTERED INTO BETWEEN DEFENDANT AND DICKERT AND EDDY HAS NO LEGAL EFFECT UPON THE RIGHTS OF PLAINTIFFS.

The lower court concluded that because of the side agreement entered into by Defendant and Dickert and Eddy in 1981 no further obligation to mine existed. In effect, the lower court concluded that the 1981 Agreement entitled "Amendment to Option to Purchase and Purchase Agreement" was valid and that any rights which existed under the original 1975 Agreement to the plaintiffs had been extinguished.

The conclusion of the lower court was incorrect. The parties to the 1975 Agreement were Dickert and Eddy and the plaintiffs. The parties to the 1981 Agreement were Dickert and Eddy and the defendant. The plaintiffs were neither notified of the negotiations for such agreement nor did they agree to any modification.

Thus, the only way in which defendant would be entitled to enter into a modification would be if the defendant had assumed the position of the plaintiffs by way of assignment. The documents do not show that the 1975 Agreement was assigned to the defendant enabling it to unilaterally renegotiate it with Dickert and Eddy.

In essence, the 1981 Agreement was an attempted novation modifying the 1975 Agreement. It is fundamental, however, that there can be no novation with its accompanying substitution of parties unless the original debtor, original creditor, and new debtor have all entered into such an agreement. Reilly v. Cook, McKay & Co., 381 P.2d 261 (Colo. 1963). See also, Kinderknecht v. Poulos, 707 P.2d 184 (Wyo. 1985), where the court found a subsequent agreement entered into between the original vendor,

original vendee, and subsequent vendee was valid and that the original terms of the first contract still remained in full force and effect unless they had been specifically modified in the second agreement.

In the instant case not only were the plaintiffs not made parties to the 1981 Agreement but the question of the plaintiffs' overriding royalty was never addressed.

The defendant effectively eliminated the concept of "royalty" by obtaining the agreement of Dickert and Eddy that no mining need to performed. However, the payments to Dickert and Eddy continued under the guise of "minimum monthly payments"--not based upon the normal royalty percentages. Hence, Defendant kept Dickert and Eddy happy while at the same time eliminating Plaintiffs' claim for overriding royalty since no coal was mined to which a royalty would have been owed.

For these reasons, therefore, Plaintiffs cannot be bound by the 1981 Agreement and are entitled to an opportunity to present to a factfinder their claim of damages for defendant' failure to mine the property in accordance with the 1975 Agreement.

POINT III

THE DEFENDANT VIOLATED ITS DUTY OF GOOD FAITH TO PROTECT THE INTERESTS OF THE PLAINTIFFS TO AN OVERRIDING ROYALTY.

Between 1981 and 1985 no coal was mined from the five properties. Nevertheless, Dickert and Eddy were paid a minimum monthly payment in lieu of a royalty during this period of time. Plaintiffs, on the other hand, were paid nothing since defendant took the position that they were only entitled to a royalty for

actual ore taken from the properties. Thus, in effect, Dickert and Eddy contracted with the defendant to eliminate the overriding royalty provision of the 1976 Agreement by changing the method of payment from a royalty based upon ore taken from the ground to a minimum monthly payment where no mining was required.

This type of conduct attempting to circumvent the plaintiffs royalty right in analogous to cases in which a sublessee allows a lease on property to lapse thereby eliminating any overriding royalty of its lessor and then going directly to the owner of the property for a new lease.

This principle can be seen in Independent Gas and Oil Producers v. Union Oil Co. of California, 669 F.2d 624 (10th Cir. 1982). In that case the owner of property executed an oil and gas lease to Union Oil Company. Union thereafter assigned the lease to the Independent Gas and Oil Producers but retained an overriding royalty. Subsequently, Independent abandoned the well and plugged it. Thereafter, an agent of Independent Gas and Oil entered into a new lease agreement with the owner of the property covering the same wells but this time having no overriding royalty of Union Oil. Union Oil claimed an interest in this second lease on the basis that the effort of Independent Gas and Oil Producers was merely a subterfuge to eliminate its valid overriding royalty and that it should still be entitled to a royalty under the first lease.

The lower court found in favor of Union Oil and held that the second lease was not valid. The Tenth Circuit Court affirmed. The Court stated:

> Oklahoma courts have ruled that a lease assignment expressly subjecting lease extensions and renewals to an overriding royalty interest converts a new lease procurred by the assignee into a renewal of the old one to which the reserve royalty attaches. This rule has been applied even where the new lease did not issue until the old one had expired for lack of production. Id. at 627. (Citations omitted).

The Court then spoke of the fiduciary obligation that Independent Gas and Oil Producers had to Union in relation to its overriding royalty. The Court stated:

> The fiduciary obligations impliedly created by the terms of such a lease assignment form the basis for the rule. Where an assignment provides that subsequent lease extensions and renewals are subject to an overriding royalty, the assignee stands as a quasi trustee vis-a-vis the assignor and must exercise the utmost faith in protecting the latter's interest in the leasehold. Consequently, any attempt by the fiduciary-assignee to procure rights antagnoistic to those of his assignor will be defeated. Id. (Emphasis added).

An Oklahoma case relied upon by the Tenth Circuit, Probst v. Hughes, 286 P. 875 (Okla. 1930), involved an instance where an assignee of a lease allowed it to terminate and then went to the owner of the property and entered into a separate lease cutting out the original lessee. The defendants in that case claimed that the lease automatically terminated when the assignee ceased production of the oil and such termination operated as a termination of the plaintiffs' overriding royalty. They further claimed that since the second lease was entered into subsequently to such termination it constituted an independent transaction unaffected by plaintiffs' claim of an overriding royalty interest.

The Court rejected this claim and held that the second lease was still subject to the original lessor's overriding royalty. In giving its reasons for such decision the Court noted the following

principle:

> If a person who has a particular or special interest in a lease, obtains a renewal thereof from the circumstances of his being in possession as tenant, or from having such particular interest, the renewed lease is, in equity, considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest either legal or equitable, in the old lease. Id. at 878.

These same principles apply herein. If defendant did not wish to continue operating the mines it was obligated to modify not only the 1975 Agreement with Dickert and Eddy but also to enter into an agreement with the plaintiffs as to their overriding interest. Both the 1975 and 1976 Agreements were based upon a good faith effort to require continued commercial mining of the properties. Defendant did not have the discretion to eliminate that obligation as to the 1975 Agreement by agreeing to pay minimum monthly payments while at the same time ceasing to make any payments on the 1976 Agreement on the basis that no ore was mined. This type of effort is a mere subterfuge to circumvent the valuable right of Plaintiffs in obtaining an overriding royalty on the production. Neither law nor equity allows such a result to occur.

It is fundamental that the law generally imposes a duty to perform contractual obligations in good faith. Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 311 (Utah 1982); Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497, 505 (Utah 1980); W.P. Harlin Construction Co. v. Utah State Road Commission, 19 Utah 2d 364, 431 P.2d 792, 793 (Utah 1967). Thus, an implied covenant of good faith forbids arbitrary action by one party that disadvantages the

other. See, W. P. Harlin Construction Co. v. Utah State Road Commission, supra, 431 P.2d at 793.

Accordingly, courts endeavor to construe contracts so as not to grant one of the parties an absolute and arbitrary right to terminate a contract. Midwest Management Corp. v. Stephens, 291 N.W.2d 896, 913 (Iowa 1980); Miller v. O.B. McClintock Co., 210 Minn. 152, 297 N.W. 724, 729 (1941); Fulcher v. Nelson, 273 N.C. 221, 159 S.E.2d 519, 522 (1968); 1 S. Williston, The Law of Contracts §105, at 418-19 (3d Ed. 1957); 17 Am.Jur.2d Contracts §496 (1964).

These same principles apply here. Plaintiffs, when entering into the 1976 Agreement with Defendant, rightfully assumed that the prior 1975 conditions of mining would always be binding on Defendant. Plaintiffs could not anticipate that Defendant would attempt to bypass them by eliminating the mining requirement of the 1975 Agreement. Such secretive action of Defendant violates its duty to act in good faith towards Plaintiffs and to not actively attempt to defeat Plaintiffs' overriding royalty interests.

The lower court failed to recognize this good faith requirement and held that the 1976 mining requirement language was essentially illusory and was completely dependent upon the whims of Dickert and Eddy regardless of any wrongful conduct by Defendant. This faulty analysis requires reversal.

CONCLUSION

The plaintiffs in this case do not dispute the concept that if the defendant had legitimately terminated its mining

obligations then any overriding royalty would have been automatically extinguished. The sole question in this case, therefore, becomes whether or not under the 1976 Agreement defendant legitimately terminated its obligation to mine. The lower court concluded that there was no standard of mining imposed upon the defendant by the plaintiffs and that essentially defendant could arbitrarily mine or not mine depending upon their own whim or caprice as long as Dickert and Eddy did not complain.

This reasoning, however, ignores the fact that the 1975 Agreement was incorporated and used as a standard of measurement for the 1976 Agreement. The plaintiffs justifiably relied upon the mining obligation requirement believing fully that defendant would have to continue the mining operation unless it could show that it was commercially unprofitable. The obligation to Plaintiffs is separate and apart from the obligtion to Dickert and Eddy and thus the commercial mining standard was applicable to the overriding claim of Plaintiffs on an equal footing, even though it was not specifically repeated in the 1976 Agreement.

The lower court's failure to recognize this distinction came about by its failure to analyze the difference between an assignment and a subpurchase. The defendant was not "stepping into the shoes" of the plaintiffs as claimed by the defendant in the lower court. The plaintiffs were not merely a conduit in which the rights of Dickert and Eddy were conveyed to the defendant. Rather, the plaintiffs were separate parties which had contracted with the defendant for separate rights and obligations.

There was no privity of contract between Dickert and Eddy and the defendant except as to the obligation of the original royalty.

As a matter of law, therefore, the Agreements clearly stated a claim upon which relief could be granted. At a minimum if there is any ambiguity in the intentions of the parties based upon these three Agreements such matters should be resolved in summary judgment or in a full-blown trial. In no case, however, should this case be dismissed for failure to state a claim since the legal interpretation of the trial court is erroneous when based upon fundamental principles of contract and real estate law.

For these reasons, therefore, the decision of the lower court should be reversed and the matter should be remanded for further proceedings.

Respectfully submitted this 13th day of December, 1988.

REED L. MARTINEAU
STEPHEN J. HILL
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Appellants to David K. Isom, Scott E. Isaacson, Davis, Graham & Stubbs, Attorneys for Respondent, 1600-87 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah 84111 this 13th day of December, 1988.

APPENDIX

OPTION TO PURCHASE
AND PURCHASE AGREEMENT

This Option to Purchase and Purchase Agreement made and entered into this 25th day of May, 1975, by and between James R. Dickert and Robert Eddy, hereinafter collectively referred to as "Sellers," and Dan H. Hunter and Claude L. Heiner, hereinafter referred to as "Buyers."

W I T N E S S E T H:

WHEREAS, Sellers hold leases currently in good standing from the State of Utah on property known as the Dog Valley Mine located in Emery County, State of Utah, copies of said leases designated and referred to as SL 062712, ML 19231, ML ~~10003~~ 1003, ML 18783 and ML 17687 being attached hereto, and covering the land described in Exhibit A attached hereto, and

WHEREAS, Sellers are willing to give to Buyers and Buyers desire to obtain from Sellers an option, and in the event of exercise of the option, to purchase said leases upon the terms and conditions hereinafter set forth,

---

Exhibit "A"

NOW, THEREFORE, in consideration of the premises and the mutual covenants and conditions hereinafter set forth it is agreed as follows:

1. Option to Purchase. In consideration of the payment of $10,000.00 by Buyers to Sellers concurrently with the execution of this Agreement, the receipt of which is hereby acknowledged, Sellers do hereby grant to Buyers for a period of three (3) months from the date hereof an option to purchase the said leases.

2. Exercise of Option. The option herein granted shall be considered exercised by Buyers upon their having within the option period deposited in the United States mail, postage prepaid, certified mail, a written notice of the exercise of the option and payment upon the transfer to them of the said leases of the further sum of $20,000.00.

10
20

3. Assignment and Transfer of Leases and Equipment. Upon the exercise by Buyers of the option herein granted as above provided Sellers will assign and transfer to Buyers the said leases unencumbered, in

good standing and subject to no past-due royalties or to royalty interests other than those in favor of the State of Utah under said leases and including all mines and workings located on the property, together with an assignment of unencumbered title to all of the equipment and machinery now located upon the premises, excluding only the front end loader, the Ford truck, the diesel shuttle buggy, the Case crawler tractor, the stockpile of coal and all diesel fuel and powder located on the premises, all of which shall remain the property of Sellers who shall have the right to remove and retain the same. Sellers agree that any and all fines, penalties, assessments and charges by any governmental authority or otherwise which have been or may be hereafter assessed upon the mine or which are related to its operation for periods prior to the date of this Agreement shall not be the obligation of Buyers and Sellers will hold Buyers harmless therefrom. Any such fines, penalties, assessments and charges which relate to the period after the date of this Agreement shall be and remain the obligation of

Buyers. In addition, Sellers hereby agree to give all necessary and appropriate assistance to Buyers in obtaining a transfer of said leases to Buyers' names. Buyers hereby agree that from and after the transfer to them of said leases they will enter onto the subject lands and commence mining operations for coal with reasonable dispatch and to continue such mining operations with reasonable diligence until all of the reasonably minable and merchantable coal on, in and under the subject lands has been mined, removed and sold. Merchantable coal shall include only that coal that can be mined, removed and sold at a reasonable profit. In the event of the occurrence of an event or events beyond the reasonable control of the Buyers then Buyers shall be excused from performing the obligations imposed upon them under this paragraph during the continuation of such event and to the extent made reasonably necessary by such event.

4. Royalty. Buyers hereby agree to pay to Sellers or their nominee on or before the 28th day of February

and on or before the 31st day of July of each year, on the basis of the semi-annual accounts for the coal sold in the preceding six-month period, an overriding royalty of 25 cents per ton of coal mined from the leased premises as sold, said royalty to be computed on the same volume as the royalties due the State of Utah under said leases plus 1% of all amounts by which the price received by Buyer for coal loaded at the mine site shall exceed $15.00 per ton of coal so removed from the leased premises and sold (i.e., if the price received for coal loaded ready for hauling at the mine site by Buyer, but excluding any transportation charges, is $20.00 per ton then the royalty would be 25 cents per ton plus 1% of the $5.00 or 5 cents per ton), it being understood that in no year will Sellers receive a royalty payment less than $12,000.00 until total royalties of $100,000.00 shall have been paid, including $28,000.00 representing the initial $10,000.00 option payment and $18,000.00 of the $20,000.00 payment to be made upon exercise of the

option (the remaining $2,000.00 of said $20,000.00 payment being the payment for the machinery and equipment), it also being understood that payments in any year in excess of actual royalties due based upon production shall be considered as advance royalty payments to be applied upon production of coal subsequent to payment in full of said $100,000.00.

5. Termination of Leases. In the event Buyers shall voluntarily decide to terminate their interest under any of said leases or in the event of the default of Buyers or their assignees under any of said leases which default shall remain uncorrected after thirty (30) days' actual notice of such default, Sellers shall be entitled to the reassignment of the leases and Buyers agree to use their best efforts to secure the approval or consent of the Utah State Land Board to such reassignment. In such event, Sellers shall also be entitled to the original machinery or equipment, if any, which shall be on the premises at the notice of default, it being understood that Buyers shall have no

obligation to maintain or preserve any of such machinery or equipment on the premises.

6. Inspection of Records. Sellers will make available to Buyers at reasonable times the accounts and records of prior production and activity of the mine together with all drill hole information available to Sellers, including logs, reports and coal analysis information. Sellers will also deliver to Buyers the mine map and timber plan submitted by Sellers to the Bureau of Mines. Buyers shall make available for inspection by Sellers at reasonable times the accounts and records of their production during the term of this Agreement.

7. Enforcement of Agreement. The parties agree that should they default in any of the covenants or agreements contained herein, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee which may arise or accrue from any remedy in law or in equity in enforcing this contract or in pursuing any remedy whether such remedy is

pursued by filing a suit or otherwise.

8. Successors and Assigns. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the said parties to this Agreement have hereunto signed their names, the day and year first above written.

SELLERS:

James R. Dickert

Robert Eddy

BUYERS:

Dan H. Hunter

Claude L. Heiner

PURCHASE AGREEMENT

THIS AGREEMENT dated as of March 1, 1976, between S. J. Groves & Sons Company, a Minnesota corporation, with offices at 10000 Highway 55 West, Minneapolis, Minnesota 55441 ("Buyer"), and Western States Coal Corporation, a Utah corporation, 2330 South Main Street, Salt Lake City, Utah 84115, and Western States Properties, a Utah partnership, with offices at 2330 South Main Street, Salt Lake City, Utah 84115 ("Sellers").

W I T N E S S E T H:

In consideration of the mutual covenants and agreements herein contained, the parties agree as follows:

1. Definitions.

In this Agreement, the following terms shall have the following defined meanings:

1.1 "Leases or Leased Property" means State of Utah coal lands leases ML 19231, ML1003, ML18783, ML17687, and SL062712, copies of which are attached hereto as Exhibit "A-1," pertaining to lands situate in Emery County, Utah, containing 440 acres more or less, together with all permits, licenses, approvals or other leases appurtenant thereto or used in connection therewith, all as more particularly described in Exhibit "A-1."

1.2 "Other Property Rights" means (1) the railroad siding property designated and referred to as the Aurora Railroad Siding, at or near Aurora, Utah; (2) the State of Utah Special Use Lease Agreement No. 365 for a parcel adjacent to the Lease Property; (3) a well; and (4) Application No. 45337 to appropriate water, all as more particularly described on Exhibit "A-2" attached hereto.

1.3 "Equipment" means the mining and earth-moving equipment and machinery, fixtures, vehicles, rolling stock, trackage, other personal property, buildings, and leasehold improvements described in Exhibit "A-3," together with a quantity of supplies at least equal to amounts listed on Exhibit "A-3a" attached hereto.

1.4 "Net Assets" means (1) the Leases; (2) the Other Property Rights; and (3) Equipment.

1.5 "Assumed Liabilities" means charges and obligations of Sellers, liens against the Leases, Other Property Rights and Equipment and burdens on production to be assumed by Buyer, in addition to the purchase price herein provided to be paid, all as specified in Exhibit "A-4."

1.6 "Offset Liabilities" means such Assumed Liabilities as are to be paid directly by Buyer and charged against the Purchase Price as specified in Exhibit "A-5."

1.7 "Excess Liabilities" means liens against the Leases, Other Property Rights and Equipment and burdens on production in excess of those specified in Exhibit "A-4" and Exhibit "A-5."

2. Purchase and Sale.

2.1 Sellers agree to sell to Buyer and Buyer agrees to purchase from Sellers the Net Assets subject only to Assumed Liabilities on the terms of this Agreement.

2.2 Promptly upon request of Buyer, Sellers shall execute a Memorandum of Agreement in recordable form for recordation by Buyer substantially as set forth in Exhibit "A-6" attached hereto.

2.3 A Closing shall be set at the offices of Davis, Graham & Stubbs, 2600 Colorado National Building, Denver, Colorado, as soon as possible after Buyer gives Sellers verbal notice that conditions of Closing are satisfied but not later than thirty (30) days from the date of this Agreement, or at such other time and place as may be agreeable to both the Sellers and the Buyer.

3. Purchase Price.

3.1 The total purchase price for the Net Assets shall be:

(a) Two Million Dollars ($2,000,000), adjusted as in Section 3.2 provided, to be paid in certified funds at Closing as follows:

(i) One Million Dollars ($1,000,000.00) to Western States Coal Corporation for purchase of the Equipment (Exhibit "A-3"), the Other Property

3.2 Payments at Closing shall be reduced by the amounts of the following:

(a) Offset Liabilities, if any, as set forth on Exhibit "A-5" and Excess Liabilities, if any, if not discharged by Sellers at or prior to Closing.

(b) Taxes and other deferred costs, if any, attributable to the possession and operation of the Leased Property by Sellers prior to date of Closing.

(c) The fair market value of any Net Assets, except Leases, not transferable to Buyer because of title failure or otherwise. In the event that one or more of the Leases is not transferable because of title failure or otherwise Buyer may, at its option, terminate this Agreement by notice to Sellers and the obligations of Buyer and Seller hereunder shall thereupon terminate.

(d) All costs borne by Buyer under paragraph 4 to satisfy conditions required of Sellers for Closing.

4. Disclosures by Sellers.

4.1 Sellers shall furnish to Buyer with, or make available to Buyer within ten (10) days following execution of this Agreement:

(a) Lease files and other documents of title in the possession of or available to Sellers showing title of the Net Assets in Sellers.

(b) Copies of all contracts, and other obligations of Sellers, including all matters described in Exhibits "A-1" and "A-2," affecting the use of the Net Assets, the sale of production from the Leased Property and the rights of Sellers in and to the Net Assets.

(c) Copy of the approved mining plan or plans for the Leases, and all permits, licenses and authorizations of government authorities for the conduct of mining operations on the Leased Property.

(d) All geological and geophysical maps, surveys, core analyses, assays, logs and related data in the possession of or available to Sellers showing reserves, disposition and chemical qualities of coal deposits.

(e) All books and records of Sellers regarding development and operation of the Leases.

(f) All hydrological data, reports, test results, and other data relating in any way to the

permeability of the formation from which water included in Other Property Rights is being produced or to the determination of the yield of the well from which such water is being produced, and all approved well permits for such well.

(g) An executed purchase agreement relating to the purchase of the Aurora Railroad Siding by Sellers.

(h) A copy of the partnership agreement of Western States Properties.

Sellers hereby represent and warrant that the information and documents provided or made available pursuant to subparagraphs (a) through (h) above and to the best of Sellers' knowledge are complete and there are no other material documents or information which have not been disclosed or made available to Buyer.

5. Obligations of Sellers.

5.1 Buyer's obligations under this Agreement are conditioned upon the following:

(a) Sellers' delivery to Buyer at the Closing:

(i) Assignments and Bill of Sale in form appended hereto as Exhibit "A-7" to vest Buyer with good and marketable title to the Net Assets subject only to the Assumed Liabilities;

(ii) All documents described in Section 5.2.

(b) Performance by Sellers of all obligations described in Section 4.1;

visual examination and face samples (to be taken on ASTM standards with split samples provided for independent testing by Sellers) that mineable coal exposed under ground on any major part of the I seam is not less than 11,500 BTU's ± 200;

(d) Reasonable satisfaction of Buyer, by test conducted prior to Closing at times convenient to Sellers, that well is physically capable of delivering at least 20 gpm of water on sustained pumping (12 hour test) and is available for use by Buyer pending issuance of permit by state;

(e) Reasonable satisfaction of Buyer that legal access exists to the Leased Property and to the Aurora Siding.

If Buyer is not satisfied that the foregoing conditions in this Section 5.1 have been met at or prior to Closing, Buyer shall have the option, at Buyer's sole election:

(i) To terminate this Purchase Agreement; provided only that this option is not available to Buyer for a failure of access to the Aurora Siding;

(ii) To allow Sellers additional time, not in excess of sixty (60) days, to satisfy said conditions; or

(iii) To close, satisfy said conditions itself, and deduct the cost of satisfaction, including reasonable attorneys' fees, not to

exceed Fifty Thousand Dollars ($50,000.00), from the price payable at Closing; provided only that Buyer's acceptance of the Net Assets at the Closing shall not discharge Sellers from responsibility for their warranties under Section 7. In any event Buyer shall be limited to the remedies described within this paragraph (which must be exercised at or prior to Closing) for the failure of Seller to satisfy any obligation or condition described or referred to in this paragraph with the exception of the warranties under Section 7.

5.2 At or prior to Closing, Sellers shall provide Buyer the following:

(i) Copy of a resolution of the stockholders and Board of Directors of Western States Coal Corporation certified by the Secretary thereof and agreement of the Managing Partners of Western States Properties, authorizing the sale of the Net Assets on the terms of this Agreement and (in the case of the shareholders of Western States Coal Corporation) a resolution showing concurrence of the owners of not less than two-thirds of the outstanding stock.

(ii) Certificate of the Secretary of Western States Coal Corporation giving the names of the officers of that company and their authority

to execute and perform this Agreement in accordance with the provisions hereof.

(iii) Opinion dated the Closing Date from legal counsel for Sellers to counsel for Buyer that (a) Western States Coal Corporation is a Utah corporation duly incorporated, organized,

3/2/76

to execute and perform this Agreement in accordance with the provisions hereof.

(iii) Opinion dated the Closing Date from legal counsel for Sellers to counsel for Buyer, substantially in the form of Exhibit "A-8" attached hereto, that (a) Western States Coal Corporation is a Utah corporation duly incorporated, organized,

validly existing and in good standing under the laws of the State of Utah; (b) Western States Properties is a Utah partnership duly organized, validly existing and in good standing under the laws of the State of Utah; (c) the appropriate officers of Western States Coal Corporation and the Managing Partners of Western States Properties have all necessary authority to convey all of Sellers' interest in the Net Assets to Buyer and perform all other obligations required of Sellers on the terms of this Agreement; and (d) that the transactions herein contained are exempt from the provisions of the Utah Bulk Sales Act, Utah Code Annotated § 70A-6-101, et seq.

(iv) From and after the date of this Agreement Sellers shall allow Buyer and employees of Buyer access to the Leased Property to conduct limited surveys.

5.3 Following the Closing, Claude L. Heiner, as an individual, shall serve as a consultant to Buyer to assist Buyer in the management of operations on the Leased Property. In pursuance thereof, Claude L. Heiner shall be reasonably available as requested from time to time as his schedule shall permit, but not more than two (2) days per week and for a period not to exceed three (3) months. Claude L. Heiner shall receive for such services compensation in the amount of $150 per day plus expenses.

5.5 Sellers shall provide Buyer with the names of potential customers contacted by Sellers for the sale of coal from the Leased Property and neither Sellers nor Claude L. Heiner or Dan H. Hunter shall, directly or indirectly, acquire coal mineral interests, by leases, assignment, purchase or otherwise within thirty (30) miles of the Leased Property for a period of two years from the date hereof, except to the extent that such acquisition may be hereafter approved by Buyer. Sellers and Claude L. Heiner and Dan H. Hunter agree to use their best efforts to keep available for Buyer the services of present employees including a certified coal mine superintendent and other technical ratings needed for Buyer's operation, as well as contractors, agents, coal purchasers and haulers and preserve for Buyer the good will of customers, suppliers and others having business relations with Sellers.

6. Obligations of Buyer.

At or before the Closing, Buyer shall:

6.1 Provide a copy, certified by the Secretary of Buyer, of a resolution of the Board of Directors of Buyer authorizing the officers of Buyer to purchase the Net Assets of Sellers on the terms of this Agreement, to assume the burdens of existing contracts of Sellers, to pay the purchase price in the manner herein provided, execute all of the documents and perform all of the obligations required of Buyer under this Agreement.

6.2 Provide Sellers with an opinion of legal counsel for Buyer that Buyer is duly incorporated under the laws of Minnesota, is in good standing and through its officers has power and has all necessary authority to commit itself legally to and fully perform all of the obligations assumed by Buyer under this Agreement.

6.3 Provide assumption agreements substantially in the form of Exhibit "A-9" by which Buyer assumes obligations of Sellers and agrees to hold Sellers harmless from any further liability with respect to the assumed obligations, if any.

7. Warranties of Sellers.

Sellers jointly and severally warrant unto Buyer that as of the date hereof and as of the date of Closing:

7.1 Title to the Leases is vested in one or both of the Sellers free of any liens, encumbrances, overriding royalties, production payments or contract obligations created or permitted by Sellers, except as specified in writing in the Exhibits to this Agreement. Sellers make no other warranty with respect to title to the Leases.

7.2 To the best of Sellers' knowledge, information and belief, Buyer shall not be obligated for any royalty or production payment to Sellers or to any third party except as shown in Exhibit "A-4", as provided in Section 3.1(b) hereof, and pursuant to that Agreement referred to in Section 7.10.

7.3 To the best of Sellers' knowledge, information and belief, no condition now exists that will prevent Buyer from continuing mining operations in the manner conducted in

the past by Sellers or on an expanded basis as contemplated by Buyer.

7.4 Equipment listed in Exhibit "A-3" is in reasonably good and serviceable condition, and will remain in such condition to the date of Closing, ordinary wear and tear excepted.

7.5 The well on the parcel adjacent to the Leased Property (which is included in the Other Property Rights), has to date produced water for the mining operations heretofore conducted by Sellers as shown in the well report and other data furnished to Buyer by Sellers and Buyer shall have the right to test the same at its expense at the earliest reasonable time available following execution of this Agreement.

7.6 To Sellers' best knowledge, information and belief, there is access to the Leased Property and Aurora Railway Siding adequate for coal mining operations heretofore conducted by Sellers.

7.7 Sellers will use their best efforts to obtain clear title to the Aurora Railroad Siding, near Aurora, Utah, as more fully described in Exhibit "A-2" upon Closing or within a reasonable time thereafter and Sellers will transfer to Buyer such title as they shall have been able to obtain within such period. Sellers will at Closing convey title to the siding property by a Warranty Deed in the form of Exhibit "A-10" attached hereto and provide Buyer with a policy of title insurance in the amount of Fifty Thousand Dollars ($50,000.00), subject only to the exceptions and conditions referred to in the preliminary title report,

Order No. U-15161, dated February 17, 1976, a copy of which is attached hereto as Exhibit "A-11," and thereupon Sellers' obligations under this Section 7.7 shall be fully performed.

7.8 To their best knowledge, information and belief, there are no actions, suits, or proceedings pending or threatened against or affecting the Sellers at law or equity or before any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, affecting the Leases or the Sellers' title to the Net Assets which have not been disclosed to Buyer.

7.9 Each Seller further represents severally with respect to facts within its knowledge that all material facts have been disclosed to Buyer regarding (1) the financial condition and liabilities, actual or contingent, of each Seller, insofar as the same may adversely affect Buyer's rights hereunder in the Net Assets; (2) the exploration, and development of the Leased Property, marketable quality of the coal; and (3) any other material facts reasonably bearing upon the value of the Net Assets.

7.10 Sellers represent that as of the date of Closing all of Sellers' obligations under that certain Option to Purchase and Purchase Agreement between Sellers and James R. Dickert and Robert Eddy dated May 28, 1975 are in good standing and all

obligations of Sellers thereunder as of [illegible] performed and current. Buyer will from and after the Closing perform and pay as and when due all obligations required under said Option to Purchase and Purchase Agreement dated May 28, 1975. Buyer shall indemnify and hold harmless Sellers from any and all claims, suits and liabilities relating thereto arising from acts or defaults of Buyer from and after the Closing; and Sellers shall indemnify and hold Buyer harmless from any and all claims, suits and liabilities relating thereto arising from acts or defaults of Sellers prior to the Closing.

8. Transfer of Operations.

Between the date of this Agreement and the Closing, the Sellers are authorized to continue operations in the manner hertofore conducted, to deliver coal to Kennecott Copper Corporation at McGill, Nevada, pursuant to existing purchase order and to incur and pay any and all liabilities arising in the ordinary course of business, provided only:

8.1 That Sellers keep and maintain all buildings, machinery, equipment, fixtures, vehicles and other property of Sellers in good operating condition and repair.

8.2 That Sellers will not execute any security agreement, lien, encumbrance, mortgage, deed of trust or other burden upon the Net Assets, without the prior written approval of Buyer; and

8.3 That Sellers shall not enter into or assume any contract affecting the Net Assets except as reasonably required in the normal course of business without prior

written consent of Buyer.

8.4 Income and costs relating to operations on the Leased Property shall be transferred as of the close of the night shift on the date of Closing (the "transfer date"). All coal on the Aurora Siding on the transfer date shall be segregated on the siding, shall remain the property of Sellers and shall be removed by Sellers within a reasonable time period not to exceed five (5) days. All coal on the Leased Property, whether broken at the transfer date or not, belongs to Buyer. All wages, other operating costs, insurance premiums, taxes and royalties shall be adjusted to the transfer date to the end that Sellers bear all costs on operations occurring before the transfer date and Buyer bears all costs on operations occurring thereafter.

9. Termination of Agreement.

9.1 The parties may terminate their obligations under this Agreement at the following times and for the following reasons:

(i) At Buyer's election for the failure of Sellers to satisfy all material conditions precedent to Closing;

(ii) At Sellers' election (exercisable jointly not severally) for default by Buyer in any obligation under this Agreement if Buyer does not cure the default within thirty (30) days following

written notice from Sellers as hereinafter provided of the existence and nature thereof.

9.2 If the contract is terminated pursuant to 9.1(i), Sellers shall be obligated to restore and return to Buyer all of the payments made to Buyer under this Agreement. Buyer shall reassign to Sellers the Net Assets and all parties shall thereupon be released from any further obligations under the Agreement.

9.3 If Sellers elect to terminate pursuant to 9.1(ii):

(a) Sellers shall be released from all obligations under this Agreement; and

(b) Sellers shall have the right to damages as provided in law for loss of their bargain by reason of the default of Buyer.

9.4 On termination of this Agreement for any cause, Buyer shall return to Sellers all technical geological, geophysical, assay, repoduction and related data furnished to Buyer, and all such data collected or developed by Buyer with respect to the Leased Property and any portion thereof and the operation thereof, in connection with this Agreement.

10. Closing Costs.

10.1 Each party shall bear its own expenses of preparation, authorization, execution and performance of this Agreement except as specifically provided in this Article 10.

2/23/76.

written notice from Sellers as hereinafter provided of the existence and nature thereof.

9.2 If the contract is terminated pursuant to 9.1(i), Sellers shall be obligated to restore and return to Buyer all of the payments made to Buyer under this Agreement. Buyer shall reassign to Sellers the Net Assets ~~and the Option~~ and all parties shall thereupon be released from any further obligations under the Agreement.

2/14

9.3 If Sellers elect to terminate pursuant to 9.1(ii):

(a) Sellers shall be released from all obligations under this Agreement; and

(b) Sellers shall have the right to damages as provided in law for loss of their bargain by reason of the default of Buyer.

9.4 On termination of this Agreement for any cause, Buyer shall return to Sellers all technical geological, geophysical, assay, repoduction and related data furnished to Buyer, and all such data collected or developed by Buyer with respect to the Leased Property and any portion thereof and the operation thereof, in connection with this Agreement.

10. Closing Costs.

10.1 Each party shall bear its own expenses of preparation, authorization, execution and performance of this Agreement except as specifically provided in this Article 10.

10.2 Costs arising from the Closing shall be borne by the parties in accordance with the following:

(i) Sales taxes and recording fees, if any, and costs of securing approvals for transfers of leases, contract obligations, licenses, permits, and bonds, by Buyer.

(ii) Transfer taxes, if any, and recording costs of removing Excess Liabilities of record, by Seller.

10.3 Sellers and Buyer represent that they have not used the services of any Broker or other third party in connection with this transaction and that no one is entitled to a commission or finder's fee in connection with this transaction. Should such a fee nevertheless be claimed by any person not authorized so to act by buyer or Sellers, any liability or expense incurred by reason of such claimed fee will be the responsibility of the party responsible therefor or on whose behalf such person acted or purported to act.

11. General Provisions.

11.1 All representations, warranties, indemnities, covenants and agreements herein contained shall survive the Closing and shall continue thereafter unless or until barred by applicable law.

11.2 Buyer may designate a subsidiary corporation to acquire the Net Assets of the Sellers pursuant to this Agreement and thereafter to conduct exploratory, development and mining operations under the Leases and Other Property

Rights. It is understood and agreed that Buyer may assign this Purchase Agreement to, or direct the assignment of any or all Net Assets from Sellers or others directly to said subsidiary, and by any such assignments vest in said subsidiary all rights and obligations of Buyer under this Purchase Agreement, and in said Net Assets, as fully as would be the case if said subsidiary were an initial party to this Agreement. Any such assignment shall be expressly subject to this Agreement, and Buyer shall remain primarily liable upon all the obligations of this Agreement the same as if no such assignment had been made or if assignment had been made directly to Buyer. No other assignment of this Agreement shall be made to any other party without the prior written consent of the other parties hereto, which consent shall not be unreasonably withheld. Subject to the foregoing, all covenants hereof inure to the benefit of and are binding upon the successors and assigns of each party.

11.3 Notices required or permitted by this Agreement will be deemed to have been given when made in writing, and transmitted by certified mail, postage and charges pre-paid, return receipt requested, addressed to the party or parties entitled thereto as follows:

If to Buyer:

S. J. Groves & Sons Company
10000 Highway 55 West
Minneapolis, Minnesota 55441

Attention: Herbert A. Beltz,
Vice President

with copy to:

Gary Hutchinson, Manager
S. J. Groves & Sons Company
1780 South Bellaire
Denver, Colorado 80222

If to Sellers:

Claude L. Heiner and
Dan H. Hunter
2330 South Main Street
Salt Lake City, Utah 84115

with copies as may be directed;

or to such other address as any party may designate by notice to the other parties as herein provided.

11.4 Buyer hereby agrees and warrants, as a part of the consideration for the sale to it of the Net Assets as herein provided, that it has inspected the Net Assets on its own behalf, and that in entering into this Agreement and in executing this contract it is not relying upon any representations made by the Sellers, or by any agent or servant thereof, except as specifically provided in this Agreement, but upon its own opinion and judgment, and Buyer hereby explicitly waives any claim on that account.

11.5 Sellers shall maintain in force until Closing all insurance presently in effect.

11.6 In consideration of Buyer paying offset liabilities to Claude L. Heiner and Don H. Hunter and other partners of Western States Properties in a gross amount of $90,000, Western States Properties shall release Western States Coal Corporation from the obligation it now has to pay Western States Properties $90,000 under that certain agreement between them dated January 1, 1976.

with copy to:

Gary Hutchinson, Manager
S. J. Groves & Sons Company
1780 South Bellaire
Denver, Colorado 80222

If to Sellers:

Claude L. Heiner and
Dan H. Hunter
2330 South Main Street
Salt Lake City, Utah 84115

with copies as may be directed;

or to such other address as any party may designate by notice to the other parties as herein provided.

11.4 Buyer hereby agrees and warrants, as a part of the consideration for the sale to it of the Net Assets as herein provided, that it has inspected the Net Assets on its own behalf, and that in entering into this Agreement and in executing this contract it is not relying upon any representations made by the Sellers, or by any agent or servant thereof, except as specifically provided in this Agreement, but upon its own opinion and judgment, and Buyer hereby explicitly waives any claim on that account.

11.5 Sellers shall maintain in force until Closing all insurance presently in effect.

11.6 In consideration of Buyer paying offset liabilities to Claude L. Heiner and Don H. Hunter and other partners of Western States Properties in a gross amount of $90,000, Western States Properties shall release Western States Coal Corporation from the obligation it now has to pay Western States ~~Corporation~~ $90,000 under that certain agreement between them dated January 1, 1976.

11.7 Each of the parties hereto hereby agrees to cooperate fully with the other in carrying out the purposes and intent of this Agreement and in that regard to do all acts and execute any and all documents which may reasonably be necessary or appropriate in connection therewith.

11.8 This instrument contains the entire agreement between the parties hereto with respect to the transaction contemplated herein. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah. Any suit for the enforcement or determination of any right or liability hereunder shall be brought within the State of Utah.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

S. J. GROVES & SONS COMPANY,
a Minnesota corporation

By _____
Attorney-in-Fact

ATTEST:

_____

WESTERN STATES COAL CORPORATION,
a Utah corporation

By _____

WESTERN STATES PROPERTIES,
a General Partnership

By _____
General Partner

By _____
General Partner

AMENDMENT TO OPTION TO PURCHASE AND PURCHASE AGREEMENT

THIS Amendment to Option to Purchase and Purchase Agreement ("Amendment") made and entered into as of October 1, 1981, by and between Virginia Dickert and Robert Eddy ("Sellers"), and Western States Minerals Corporation, a Utah corporation ("Buyer").

WITNESSETH:

WHEREAS, James R. Dickert and Robert Eddy, as Sellers, and Dan H. Hunter and Claude L. Heiner, as Buyers, entered into an Option to Purchase and Purchase Agreement dated May 18, 1975 ("Agreement"), pertaining to leases from the State of Utah, copies of the leases being designated and referred to as SL062712, ML19231, ML1003, ML18783 and ML17687; and

WHEREAS, Virginia Dickert has succeeded to the interest of James R. Dickert in the Agreement, and Western States Minerals Corporation has succeeded to the interest of Dan H. Hunter and Claude L. Heiner in the Agreement; and

WHEREAS, Sellers contend that Buyer is in default under the Agreement because it has not conducted mining operations since January 14, 1981, at the Dog Valley Mine, and Buyer has disputed such contention; and

WHEREAS, the Sellers and Buyer wish to settle their dispute by amending the Agreement as herein provided.

NOW, THEREFORE, in consideration of the premises and mutual covenants and conditions hereinafter set forth, it is agreed that the Agreement is amended as follows:

A. Commencing on October 1, 1981, and on or before the first day of each succeeding calendar month, this Agreement may be kept in full force and effect for the next ensuing month by Buyer's payment to Sellers of a minimum monthly royalty in the amount of Three Thousand Dollars ($3,000.00) irrespective of whether or not Buyer shall have mined during such month a sufficient quantity of coal at the royalty rate to equal such sum.

B. Payment of minimum royalty shall be due on or before the firs day of each calendar month commencing with October, 1981, and shall be paid b Buyer within fifteen (15) days thereafter. If Buyer shall fail to make timely or proper payment of any minimum royalty payment due to Sellers hereunder, Buy shall then be considered in default.

C. Payments made pursuant to paragraph A of this Amendment (minimum monthly royalty) shall be treated as a credit against the payments ma pursuant to paragraph 4 of the Agreement (production royalty payments).

D. At such time as Buyer shall have paid to Sellers, under paragraph A of this Amendment, the total sum of $1,250,000.00 (which sum is t be used as a cutoff point for minimum royalty and not a purchase price), Buyer shall have no further duty to make subsequent monthly royalty payments.

E. Buyer's obligation to make minimum monthly royalty payments pursuant to paragraph A of this Amendment, or production royalty payments pursuant to paragraph 4 of the Agreement shall terminate upon reassignment of the leases to Sellers pursuant to paragraph 5 of the Agreement.

F. Sellers waive any and all existing defaults under the Agreeme and ratify and confirm the Agreement as herein amended.

G. Occurrences of an event beyond the reasonable control of the Buyer as stated in paragraph 3 of the Agreement shall not excuse Buyer from payment of a minimum royalty of $3,000.00 per month, as set forth herein.

H. Except as herein amended, all other terms, conditions and covenants of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have executed this Amendment in triplicate as of the day and year first above written.

Virginia Dickert
VIRGINIA DICKERT

ROBERT EDDY

WESTERN STATES MINERALS CORPORATION, a Utah corporation

Louise Eddy
LOUISE EDDY

By _____

REED L. MARTINEAU
STEPHEN J. HILL
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, Utah 84110
Telephone: (801) 521-9000

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY

STATE OF UTAH

CLAUDE L. HEINER and
DAN H. HUNTER,

Plaintiffs,

vs.

S. J. GROVES & SONS COMPANY, a Minnesota corporation; and WESTERN STATES MINERALS CORPORATION, a Utah corporation,

Defendants.

COMPLAINT

Civil No. CV-4885

Plaintiffs allege:

FIRST CLAIM FOR RELIEF

1. Plaintiff Claude L. Heiner is an individual residing in Salt Lake County, State of Utah.

2. Plaintiff Dan H. Hunter is an individual residing in Salt Lake County, State of Utah.

3. Defendant S. J. Groves & Sons ("S. J. Groves"), is a Minnesota corporation with its principal place of business in the State of Minnesota.

4. Defendant Western States Minerals Corporation ("Western States Minerals"), is a Utah corporation with its principal place of business in the State of Colorado.

5. Venue is properly laid in this judicial district pursuant to Utah Code Ann. Section 78-13-4, since this is an action on a contract obligation which defendants were required to perform in Emery County, State of Utah.

6. On or about March 1, 1976, Western States Properties, a Utah partnership, and Western States Coal Corporation, a Utah corporation, as Sellers, and defendant S. J. Groves, as Buyers, entered into an agreement entitled Purchase Agreement (a copy of which is attached hereto as Exhibit A), whereunder S. J. Groves purchased certain assets from Sellers, including particularly, their interest in a coal mine located in Emery County, Utah, commonly known as the Dog Valley Mine. As consideration for the purchase, S. J. Groves agreed, among other things, to pay Western States Properties, its successors and assigns, an overriding royalty on all coal produced and sold from the mine by S. J. Groves in the amount of twenty (20) cents per ton on the first 2.5 million tons and thirty (30) cents per ton on all coal sold and produced thereafter.

7. Plaintiffs have succeeded to the royalty interests of Western States Properties under the Purchase Agreement.

8. On information and belief, S. J. Groves assigned its interest as Buyer under the Purchase Agreement to defendant Western States Minerals.

9. Paragraph 1.9 of the Purchase Agreement allows the Buyer to terminate its obligations under the agreement only for the failure of plaintiffs to satisfy all material conditions precedent to closing.

10. The Sellers satisfied all material conditions precedent to closing.

11. Paragraph 8.3 of the Purchase Agreement requires the Buyer to "perform and pay as and when due all obligations required under [that certain] Option to Purchase and Purchase Agreement dated May 28, 1975, [between plaintiffs, as Buyers, and James R. Dickert and Robert Eddy, as Sellers]," a copy of which is attached hereto as Exhibit B (the "Option Agreement").

11. Paragraph 3 of the Option Agreement provides in pertinent part as follows:

> Buyers hereby agree that from and hereafter the transfer to them of said leases they will enter onto the subject lands and commence mining operations for coal with reasonable dispatch and to continue such mining operations with reasonable diligence until all of the reasonably mineable and merchantable coal on, in and under the subject lands has been mined, removed and sold. Merchantable coal shall include only that coal that can be mined, removed and sold at a reasonable profit.

12. The obligations of Paragraph 4 of the Option Agreement are binding on defendants and require that they continue mining operations at the Dog Valley Mine until all "merchantable coal" is removed.

13. Defendants have breached their duty to mine under Paragraph 4 of the Option Agreement by ceasing mining operations at the Dog Valley Mine during 1981, and terminating, or at least taking steps to terminate, the underlying state coal leases relating to the mine in 1985, without having removed all "merchantable coal."

14. As a direct and proximate result of such breach, plaintiffs have been and will be deprived of royalties to which they are entitled under the Purchase Agreement. Plaintiffs are entitled to recover such royalties as damages in an amount to be proven at trial, but not less than $1,000,000.00.

SECOND CLAIM FOR RELIEF

15. Plaintiffs reallege and incorporate by reference the averments of paragraphs 1 through 14.

16. On or about October 1, 1981, defendant Western States Minerals entered into an agreement with Virginia Dickert and Robert Eddy entitled "Amendment to Option to Purchase and Purchase Agreement" (the "Amendment") whereunder it agreed to pay Dickert and Eddy $3000 per month until it had paid them the

sum of $1,250,000 in order to be relieved of the obligation to mine under the Option Agreement.

17. Western States Minerals did not involve plaintiff in any negotiations concerning the Amendment and gave plaintiff no notice of the Amendment.

18. By entering into the Amendment and suspending mining operations, Western States Minerals breached its duty to plaintiffs under the Purchase Agreement to extract all "mineable coal" and pay plaintiffs royalties therefor.

19. As a direct and proximate result of such breach, plaintiffs have been and will be deprived of royalties to which they are entitled under the Purchase Agreement. Plaintiffs are entitled to recover of defendants such royalties as damages in an amount to be proven at trial, but not less than $1,000,000.

WHEREFORE, plaintiffs pray for the award of damages in an amount which shall be proven at trial,but not less than $1,000,000.00 together with their costs incurred herein, including reasonable attorneys' fees.

DATED this 9th day of January, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Reed L. Martineau

By _____
Stephen J. Hill

SCM1213W

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY
STATE OF UTAH

CLAUDE L. HEINER and DAN H. HUNTER, Plaintiffs, vs. S. J. GROVES & SONS COMPANY, a Minnesota corporation, and WESTERN STATES MINERALS CORPORATION, a Utah corporation, Defendants.	MEMORANDUM DECISION ON MOTION TO DISMISS Civil No. 4885

Defendants S. J. Groves and Sons Company, and Western States Minerals Corporation have moved the Court for an order dismissing this case against them for failure of the Complaint to state a cause of action. It is the contention of the defendants that if the facts as alleged in the Complaint are accepted as true that the plaintiffs are not entitled to relief as a matter of law. The plaintiffs have filed an Objection to the Motion and the parties have submitted their Memorandums of Legal Points and Authorities, and the Court heard oral arguments on the Motion on December 22, 1987, and took the matter under advisement and rules as hereinafter stated.

The plaintiffs base their Cause of Action on two written and duly executed contracts. One is dated March 1, 1976, between Western States Properties, a Utah partnership, and Western States Coal Corporation, a Utah corporation, as

sellers, and defendant S. J. Groves as buyer. (Referred to as Western States Minerals Contract) The other is an Option to Purchase and Purchase Agreement, dated May 28, 1975, with James R. Dickert and Robert Eddy, as sellers and the plaintiffs as buyers. (Referred to as the Dickert Agreement) The plaintiffs' Complaint states that the two agreements are attached as exhibits, but are not in the file as attachments. However, the parties have submitted copies of the two agreements with their memorandums and, therefore, the Court has the contracts before it. The Court will assume that the various assignments of interest as alleged in the Complaint have occurred and are true.

In the Dickert Agreement, the plaintiffs, for a cash payment, were assigned certain coal leases and they purchased certain equipment and Dickert and Eddy were given an over-riding royalty on coal mined and sold from the leases and the mining operation. The plaintiffs, under the Agreement as stated in Paragraph 4, were under an obligation to Dickert and Eddy to enter on the premises and with reasonable dispatch commence mining operations, and to continue until all reasonable minable and merchantable coal had been mined and sold at a reasonable profit.

Under the Western States Minerals Agreement of March 1, 1976, the defendants bought and paid for all of the net assets of the plaintiffs in the coal leases, equipment and all property rights obtained by them from Dickert and Eddy. The

allegation of the Complaint is that under the Western States Minerals Agreement the defendants purchased the interest of Western States Properties, a partnership, and Western States Coal Corporation in a coal mine commonly known as Dog Valley Mine.

An examination of that purchase agreement shows that defendants paid $2,000,000 in cash and assumed monetary obligations and received the complete Dog Valley mining operation. The agreement is explicit and not ambiguous. One of the sellers, Western States Properties, reserved an over-riding royalty in the assigned coal leases on all coal produced and sold from the leased property by defendants, its successors and assigns. (Paragraph 3.1(b))

The plaintiffs allege, and we will assume this to be true, that they have succeeded to the royalty interest of Western States properties as reserved in the Western States Mineral's Agreement.

The Western State Minerals Agreement places the duty on defendants on behalf of Western States Properties and Western States Minerals to "perform. . . .all obligations required under said option to purchase and purchase agreement dated May 28, 1975. Buyers shall indemnify and hold harmless sellers from all and any claims, suits, and liabilities relating thereto arising from acts or defaults of buyer (defendants) from and after closing".

By such a provision, it is obvious that defendants were required, and became obligated to Dickert and Eddy to enter onto the subject land and commence mining operations and to continue such mining operations as long as it could be done profitably. This obligation was one owed to Dickert and Eddy and was not restated as an obligation to Western States Properties in the March 1, 1976 Agreement.

The Complaint alleges that the defendants satisfied this obligation to mine with Dickert and Eddy by entering into a separate agreement with them and paying them a cash consideration.

The plaintiffs are alleging a duty on the part of the defendants to perform mining that is not owed to them and which does not exist and is not set forth in either of the Agreements relied upon. The Agreements clearly state that the defendants owed a duty to mine to Dickert and Eddy, and owed a duty to the plaintiffs to pay a royalty on all coal mined and produced by them. The defendants, as stated in the Complaint, have satisfied the obligation to Dickert and Eddy and have ceased mining and have produced and sold no coal so that no royalty is owing.

The Court quite agrees with the reasoning set forth in the case of Piamco, Inc. v. Shell Oil Company handed to the Court by counsel for the plaintiffs at oral arguments and which case is a Federal case from the Seventh Circuit. In that case the Court found and stated that there can be no doubt that as a

general matter over-riding royalty obligations end with the termination of the estate from which the interests were carved, absent an express contractual provision to the contrary. The Court went on to state that the Agreement between these parties itself manifest a clear intention to bind Shell to make such royalty payments regardless of the fate of the undermining leases.

In this case, we have no clear intention stated in the Agreement that this would be the case.

On the contrary, the Agreement is very clear and unambiguous that the royalty that may due to the plaintiffs will be paid on all coal mined and sold by the defendants or its assigns. There was no express agreement to pay any sort of a minimum or to continue mining idefinitely as contended by the plaintiffs.

Based upon the alleged facts in the Complaint, the Court finds that the plaintiffs have failed to state a cause of action upon which relief can be granted and, therefore, grants the Motion to Dismiss.

The Court directs that the Attorney for the defendants prepare a formal order to this affect.

DATED this 23rd day of December, 1987.

BOYD BUNNELL, District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the foregoing MEMORANDUM DECISION ON MOTION TO DISMISS by depositing the same in the United States Mail, postage prepaid, to the following:

Reed L. Martineau
Stephen J. Hill
SNOW, CHRISTENSEN & MARTINEAU
Attorneys at Law
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, Utah 84110

David K. Isom
Scott E. Isaacson
DAVIS, GRAHAM & STUBBS
Attorneys at Law
1600-87 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

DATED this 23rd day of December, 1987.

Secretary